

DO NOT FILE COPY ORIGINAL

LAW OFFICES

FISHER, WAYLAND, COOPER AND LEADER

1255 TWENTY-THIRD STREET, N.W.

SUITE 800

WASHINGTON, D. C. 20037-1170

TELEPHONE (202) 659-3494

TELECOPIER (202) 296-6518

WRITER'S DIRECT NUMBER

(202) 775-3547

December 7, 1993

ORIGINAL

BEN S. FISHER
(1890-1954)

CHARLES V. WAYLAND
(1910-1980)

OF COUNSEL
JOHN Q. HEARNE

RECEIVED

DEC - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEN C. FISHER
GROVER C. COOPER
MARTIN R. LEADER
RICHARD R. ZARAGOZA
CLIFFORD M. HARRINGTON
JOEL R. KASWELL
KATHRYN R. SCHMELTZER
DOUGLAS WOLOSHIN
DAVID D. OXENFORD
BARRY H. GOTTFRIED
ANN K. FORD
BRUCE D. JACOBS
ELIOT J. GREENWALD
CARROLL JOHN YUNG
JOHN JOSEPH McVEIGH
BARRIE D. BERMAN
BRUCE F. HOFFMEISTER
SCOTT R. FLICK
FRANCISCO R. MONTERO
GREGORY L. MASTERS*
ROBERT C. FISHER
LAUREN ANN LYNCH
BRIAN J. CARTER
GLENN S. RICHARDS
KELLY D. YAKSICH
JOHN M. BURGETT*
SHARON L. TASMAN*
THERESA A. SMYTH
JULIE ARTHUR GARCIA*
LAUREN SCHAEFER DRAKE*

*NOT ADMITTED IN D.C.

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-221

RM-8265

In the Matter of Amendment of
Section 73.202(b) Table of Allotments
FM Broadcast Stations
(East Wenatchee, Ephrata and Chelan
Washington)

Dear Mr. Caton:

On behalf of KSEM, Inc., a party to the above-referenced rule making proceeding, attached is a copy of a Petition to Dismiss or Deny that KSEM is simultaneously filing against the application of TRMR, Inc. for a new FM station on Channel 230A at Ephrata, Washington. Since TRMR's application for Ephrata conflicts with the petition for rulemaking filed by Hartline Broadcasters (whose principals are the same as TRMR's), the Petition to Dismiss or Deny the Ephrata application should be


No. of Copies rec'd
List ABCDE

044
MMB

- 2 -

considered in conjunction with the above-referenced rulemaking proceeding.

Very truly yours,


Kathryn R. Schmeltzer

KRS:srb
attach.
4745-000.L4

cc w/attach: Michael C. Ruger, Esq.
John F. Garziglia, Esq.
Melodie Virtue, Esq.
Mr. Brian J. Lord

BEFORE THE

DEC - 7 1993

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C.

In re Application of)	
)	
TRMR, Inc.)	FCC File No. BPH-930721MC
)	
For a Construction Permit)	
for a New FM Broadcast Station)	
on Channel 230C2 at)	
Ephrata, Washington)	

TO: The Chief, Mass Media Bureau

PETITION TO DISMISS OR DENY

KSEM, Inc., the licensee of Station KDRM(FM), Channel 257A, Moses Lake, Washington (hereinafter "KSEM"), hereby submits its Petition to Dismiss or Deny the above-referenced application.^{1/} As demonstrated herein, the principals of TRMR, Inc. ("TRMR") also have pending a petition for rulemaking requesting the allotment of Channel 229C2 to East Wenatchee, Washington (MM Docket 93-221)-- an allotment that can only be made if Channel 230C2 at Ephrata, Washington is deleted! The Ephrata, Washington application has thus been filed solely as a "place-saving" measure and not because of any intention by TRMR to construct and operate a station in Ephrata. Because the Ephrata, Washington

^{1/} By Public Notice, Report No. NA-173, released November 2, 1993, the Commission gave notice of the acceptance for filing of TRMR, Inc.'s application for Channel 230C2 at Ephrata, Washington and set December 7, 1993 as the date for filing petitions to deny. This petition is timely filed in response to the Public Notice.

application is inconsistent with the East Wenatchee rulemaking proceeding, TRMR's application for Ephrata must be dismissed or denied. Alternatively, the application must be designated for hearing on the following issues:

- (1) To determine whether TRMR, Inc.'s application for Channel 230C2 at Ephrata, Washington is inconsistent with the petition for rulemaking filed by Hartline Broadcasters proposing the allotment of Channel 229C2 to East Wenatchee, Washington.
- (2) To determine whether TRMR, Inc. and/or its principals, Thomas and Melina Read, have abused the Commission's processes.
- (3) To determine, in light of the evidence adduced under the foregoing issues, whether TRMR, Inc. and/or its principals possess the requisite qualifications to be Commission licensees.

I. STANDING OF PETITIONER

1. KSEM's FM station, KDRM, is licensed to Moses Lake, Washington. TRMR's proposed station on Channel 230C2 at Ephrata, Washington will place a 1 mV/m signal over the community of Moses Lake. Accordingly, KSEM has the requisite standing to file this petition.^{2/} See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

^{2/} KSEM has standing on another ground as well. On September 24, 1993, KSEM filed Comments and a Counterproposal in the East Wenatchee rulemaking proceeding. KSEM's Counterproposal requested the Commission to delete Channel 230C2 from Ephrata and allot Channel 230C3 to Moses Lake in place of Channel 257A. This would permit KSEM to upgrade from Channel 257A to Channel 230C3.

II. BACKGROUND

2. On May 27, 1993, a petitioner calling itself Hartline Broadcasters ("Hartline") filed a petition for rule making requesting the allotment of FM Channel 229C2 to East Wenatchee, Washington. In order to effectuate its request, Hartline, inter alia, proposed the deletion of vacant Channel 230C2 at Ephrata, Washington. The petition represented that "Hartline Broadcasters has a present intention to apply for Channel 229C2 at East Wenatchee, Washington when allotted, and when authorized, to build a station promptly." The petition was assigned the rulemaking number RM-8265.

3. In response to Hartline's petition, on July 21, 1993 the Chief of the Allocations Branch adopted a Notice of Proposed Rulemaking and Order to Show Cause in MM Docket No. 93-221 (DA 93-947, released August 4, 1993) ("NPRM"). The NPRM sought comment on the proposed allotment of Channel 229C2 at East Wenatchee, Washington. The NPRM also noted that there had been no expression of interest for vacant Channel 230C2 at Ephrata and, in order to accommodate Hartline's proposal, proposed the deletion of that channel (NPRM, n.1). A comment date of September 24, 1993 and a reply comment date of October 12, 1993 were established in the NPRM.

4. On the very day that the staff adopted its NPRM concerning the proposed East Wenatchee, Washington allotment, TRMR filed its application for Channel 230C2 at Ephrata, Washington. The TRMR application was filed by the same attorney who was representing Hartline.

5. On September 24, 1993, a number of parties, including KSEM, filed comments and counterproposals in the East Wenatchee rulemaking proceeding. KSEM's Comments argued that there was a serious conflict between the Hartline proposal and the TRMR application. Specifically, KSEM noted that TRMR is owned by Thomas W. Read and his wife Melinda Boucher Read and Mr. Read has also used the name Hartline previously. Moreover, the fact that the Hartline petition and the TRMR application were filed by the same counsel indicated that the objectives of Hartline and TRMR were one and the same -- namely to safeguard Hartline's East Wenatchee rulemaking proposal by blocking any counterproposals. KSEM contended, in its Comments and subsequent Reply Comments, that both the TRMR Ephrata application and the Hartline petition for rulemaking should be dismissed or denied.

6. Lo and behold, Hartline and TRMR jointly filed Comments in the East Wenatchee rulemaking proceeding, through their attorney, admitting that the two entities are composed of the same principals. The argument advanced by Hartline/TRMR is that TRMR should be afforded cut-off protection for its Ephrata application and that once it is granted a construction permit for Ephrata, "it would be fully eligible to seek a change in its community of license [to East Wenatchee] under established Commission precedent."

III. THE SERIOUS CONFLICT BETWEEN TRMR'S EPHRATA APPLICATION AND HARTLINE'S PETITION FOR RULEMAKING MANDATES DISMISSAL OR DENIAL OF THE EPHRATA APPLICATION

7. Hartline and TRMR are engaged in a serious abuse of the Commission's processes which cannot be tolerated. Tom and Melinda Read, through two corporate alter egos, have: (a) filed a petition for rulemaking requesting the FCC to delete Channel 230C2 from Ephrata so that Channel 229C2 can be allotted to East Wenatchee and (b) filed an application for a construction permit to construct and operate a station on Channel 230C2 at Ephrata -- the very channel that the Reads had earlier proposed to delete. Nothing can be more inconsistent! Nothing could be more of a fraud! The purpose for this transparent maneuvering is clear.

8. By filing an application for the vacant Ephrata channel as soon as the East Wenatchee NPRM was released, the Reads intended to lodge an artificial "expression of interest" in the vacant channel that would preclude the grant of any counterproposals -- such as KSEM's -- that would involve the deletion of Ephrata Channel 230C2 to accommodate an upgrade at another community. Having blocked any counterproposals to the East Wenatchee, rulemaking proceeding and having secured cut-off protection for the Ephrata application, the Reads -- by their own admission in their East Wenatchee comments -- intend to move the Ephrata C2 facility to East Wenatchee, thereby achieving through conflicting and fraudulent expressions of interest, their original objective. Tom and Melinda Read have filed the Form 301 application for Ephrata not because they have any intention of

constructing a facility there but solely because they are attempting to (a) secure a frequency that, by their own admission, they intend to move to East Wenatchee, while (b) blocking counterproposals in the East Wenatchee rulemaking proceeding. TRMR's application to use Channel 230C2 at Ephrata is inconsistent with Hartline's petition to allot Channel 229C2 at East Wenatchee which is dependent upon the deletion of Channel 230C2 at Ephrata.^{3/}

9. Therefore, the representations (explicit in the case of the rulemaking petition and implicit in the case of the application) that Hartline and TRMR will construct and operate both Channel 230C2 and 229C2 are fraudulent -- because, as Hartline/TRMR undoubtedly know, the two facilities cannot technically coexist. In Abuses of the Broadcast Licensing and Allotment Processes, 67 RR2d 1526, 1533 (1990), the Commission discussed its concern about non-bona fide proposals affecting allotment proceedings and stated that it would sanction parties

^{3/} For many years the Commission has expressed its concern about applicants who file inconsistent and conflicting applications or otherwise abuse the Commission's processes. For instance, Section 73.3518 of the Commission's rules states that "[w]hile an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or assignee, or on behalf of or for the benefit of the same applicant, his successor or assignee." Section 73.3517 of the rules bars contingent applications; Section 73.3519 bars repetitious applications; and Section 73.3520 bars multiple applications. Each of these rules has been in effect for many years and has been strictly enforced. See e.g. Big Wyoming Broadcasting Corp., 63 RR2d 981 (1987). Big Wyoming stands for the proposition that a rule violation occurs when an inconsistent application is filed "and such a violation can never be cured by subsequent amendment because the act of filing cannot be undone." (Id. at 983-84).

who file without the intent to construct and operate a proposed facility. Hartline/TRMR is such a party. Clearly, the Ephrata application was filed simply to preclude counterproposals to Hartline's desired East Wenatchee allotment.^{4/}

10. Since TRMR has disavowed any intention to build or operate a station at Ephrata, Washington by asserting its intention to change the city of license, its Ephrata application must be dismissed. It is well settled Commission policy that construction permits are granted only to qualified applicants who have a bona fide intention to construct the facilities they propose and to render a broadcast service. See Calhoun County Broadcasting Co., 57 RR2d 641 (1985); cf. Marr Broadcasting Co., Inc., 2 FCC Rcd 3466, 63 RR2d 449 (Rev. Bd. 1987).

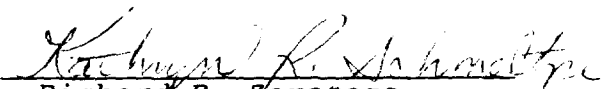
11. Since there is an irreconcilable conflict between the Hartline petition for rulemaking to allot Channel 229C2 to East Wenatchee, Washington and the TRMR application for Channel 230C2 at Ephrata, Washington, and it is evident that Hartline and TRMR

^{4/} In fact, TRMR is not eligible at all to seek a change in its community of license. See, Amendment of Table of Allotments (Santa Margarita and Guadalupe, California), 4 FCC Rcd 7887 (1989) which held that the benefits of adjacent channel upgrade proceedings do not apply to applicants. See also, Amendment of Section 73.202(b), Table of Allotments (Caldwell, Texas), 6 FCC Rcd 2050 (1991).

have engaged in an abuse of the Commission's processes, the Ephrata application should be dismissed or denied.

Respectfully submitted,

KSEM, INC.

By: 
Richard R. Zaragoza
Kathryn R. Schmeltzer
Gregory L. Masters

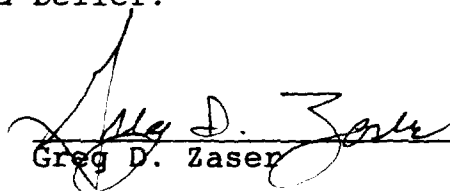
Its attorneys

FISHER, WAYLAND, COOPER
AND LEADER
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 659-3494

DECLARATION

I, GREG D. ZASER, President of KSEM, Inc., hereby declare under penalty of perjury, as follows:

I have reviewed the foregoing "Petition to Dismiss or Deny" and except for matters of which official notice may be taken, the information contained therein is true and correct to the best of my knowledge, information and belief.



Greg D. Zaser

Dated: December 2, 1993

CERTIFICATE OF SERVICE

I, SYBIL R. BRIGGS, do hereby certify that I have this 7th day of December, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing "PETITION TO DISMISS OR DENY" to the following:

*Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

*Larry D. Eads
Chief Audio Services Division
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, D.C. 20554

*Dennis Williams
Chief, FM Branch
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

*Edwin Jorgensen, Esq.
Assistant Chief, Legal
FM Branch
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

John Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
**Counsel for TRMR, Inc.
and Hartline Broadcasters**


Sybil R. Briggs

*By Hand Delivery